

Nos. 18-1063 & 18-1078

UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DUQUESNE UNIVERSITY OF THE HOLY SPIRIT,  
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,  
Respondent/Cross-Petitioner.

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER,  
MANUFACTURING, ALLIED-INDUSTRIAL AND SERVICE WORKERS  
INTERNATIONAL UNION, AFL-CIO-CLC,  
Intervenor for Respondent.

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On Petition for Review of a Decision and Order for the National Labor  
Relations Board and Cross-Application for Enforcement

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BRIEF OF INTERVENOR UNITED STEEL, PAPER AND FORESTRY,  
RUBBER, MANUFACTURING, ALLIED-INDUSTRIAL AND SERVICE  
WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

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CERTIFICATE AS TO PARTIES,  
RULINGS, AND RELATED CASES

- A. Parties and Amici. All parties, intervenors, and amici appearing before the National Labor Relations Board and in this Court are listed in the Brief for the National Labor Relations Board.
- B. Ruling Under Review. References to the rulings at issue appear in the Brief for the National Labor Relations Board.
- C. Related Cases. This case has not previously been before this Court or any other court. Counsel for intervenor is not aware of any related case currently pending in this Court or any other court.

Respectfully submitted,

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Date: October 26, 2018

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## GLOSSARY

JA Joint Appendix

NLRB National Labor Relations Board

Pet. Br. Brief of Petitioner Duquesne University of the Holy Spirit

RFRA Religious Freedom Restoration Act

## STATEMENT

It has been six years since the part-time adjunct faculty members employed by the McAnulty College and Graduate School of Liberal Arts of Duquesne University voted overwhelmingly to be represented by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC (“Union”). While “Duquesne collectively bargains with unions representing non-faculty staff,” Pet. Br. 2, the University asserts a First Amendment right not to bargain with the Union representing the adjunct faculty. The University asserts a First Amendment right not to bargain, even though the adjunct faculty in question teach only secular courses and even though the University has publicly represented – in order to achieve accreditation – that it does not subject such faculty members to religious discipline.

The Union petitioned the National Labor Relations Board to hold a representation election among the part-time adjunct professors on May 14, 2012. JA 10. The Union and the University entered into a

Stipulated Election Agreement on May 25 providing that the election would be held in a unit of all part-time adjunct faculty employed by the University in the McAnulty College and Graduate School of Liberal Arts. JA 10. Three weeks after it entered the Stipulated Election Agreement and one week before the voting by mail ballots was scheduled to begin, the University moved to withdraw from the Agreement on the grounds that it was a “church operated school” outside the NLRB’s jurisdiction under *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). JA 10-11. Noting that the University had repeatedly stipulated to the Board’s jurisdiction in representation cases arising after *Catholic Bishop*, the NLRB Regional Director denied the motion. JA 11.

The election was conducted and, by the tally of ballots on September 20, 2012, the part-time adjunct professors voted in favor of Union representation by a margin of 50 to 9. JA 68 n. 1. The University thereafter requested review by the Board. JA 68.

While the University’s request for review was pending, the Board

decided *Pacific Lutheran University*, 361 NLRB 1404 (2014), which reexamined the application of *Catholic Bishop* to religious colleges. In *Pacific Lutheran University*, the Board held that “the Act permits jurisdiction over a unit of faculty members at an institution of higher learning unless the university or college demonstrates, as a threshold matter, that it holds itself out as providing a religious educational environment, and that it holds out the petitioned-for faculty members as performing a specific role in creating or maintaining the school’s religious educational environment.” 361 NLRB at 1408. The Board remanded this case to the Regional Director for further consideration in light of *Pacific Lutheran University*. JA 68.

After a hearing on remand, the Regional Director found that the University “holds itself out as providing a religious educational environment to students, applicants, and the general public.” JA 77. However, the Regional Director also found that there was no evidence showing that the University “holds out its adjunct professors as performing any religious function in creating or maintaining its

religious educational environment.” JA 77. In particular, the Regional Director found that “a reasonable candidate for an adjunct teaching position with the Employer would not conclude that any religious responsibilities were required by their job duties.” JA 78. Having determined that the University does not hold out the part-time adjunct professors as performing a religious function, the Regional Director approved the stipulated bargaining unit. JA 79.

On review, the Board sustained the Regional Director’s approval of the stipulated bargaining unit but with one exception. The Board excluded from the unit the part-time adjunct faculty in the University’s Department of Theology. The Board explained that “a reasonable prospective applicant for a position in the University’s Department of Theology would expect that the performance of their responsibilities would require furtherance of the University’s religious mission.” JA 138. This was so, the Board explained, because “the part-time adjunct faculty in the Department of Theology teach courses that are presented as having religious content” and are expected to “have an expertise in

Catholic theology, other faith-based traditions, or other aspects of the religious experience.” JA 138. In reaching this conclusion, the Board “assessed only the University’s presentation of those courses to the faculty, students and public at large” and did not directly “assess[] the religious content of the courses they teach.” JA 138 n. 1.

The Board certified the Union as the collective bargaining representative of the unit of part-time adjunct professors. Duquesne refused to bargain with the Union in order to set up the instant petition for review of the Board’s certification.

### SUMMARY OF ARGUMENT

In *Pacific Lutheran University*, the NLRB reconsidered the application of the Supreme Court’s decision in *Catholic Bishop* to religious colleges. In so doing, the Board abandoned its “substantial religious character” test, which had entailed close scrutiny of a college’s religious nature. In its place, the Board adopted the “holding out” approach articulated by this Court in *University of Great Falls v. NLRB*, 278 F.3d 1335 (D.C. Cir. 2002). On this approach, the Board

will rely solely upon a college's public description of its educational functions and will not go behind the college's self-description.

*Pacific Lutheran University* applied the "holding out" approach to both the college's description of its institutional nature and to the college's description of the role played by faculty members. By focusing on the role of faculty, the Board returned to the original understanding of *Catholic Bishop* and to the approach followed by the Supreme Court itself.

*Catholic Bishop* held that the NLRB could not take jurisdiction over teachers at parochial schools, because to do so would cause excessive entanglement with the religious function of those schools. In so holding, *Catholic Bishop* relied on the Court's prior characterization of parochial schools in decisions involving government funding. Those decisions rested on the proposition that it would be impossible to distinguish between the secular and religious roles of teachers in such schools, because religion pervaded all aspects of the schools.

The same line of school-funding cases distinguished religious

colleges from parochial elementary and secondary schools on the ground that colleges could and often did draw a line between secular and religious educational functions. Principles of academic freedom and the demands of academic disciplines result in some colleges distinguishing secular from religious educational functions. In this regard, the Supreme Court identified as particularly pertinent the 1940 Statement of Principles on Academic Freedom of the American Association of University Professors and the Association of American Colleges.

The 1940 Statement was framed in a way that allows religious colleges to present themselves as adhering to principles of academic freedom while still imposing religious restrictions on the teaching of certain subjects. The touchstone in this regard is that the religious restrictions must be clearly stated by the college in writing and in advance of enrollment or hiring. A clear statement of religious restrictions allows the public – particularly accrediting agencies and prospective students and faculty – to know exactly where the college

stands on the matter of academic freedom and religious restrictions.

The ability to clearly differentiate secular from religious educational functions is crucial to many religious colleges. Doing so allows these colleges to meet established accreditation standards, all of which require adherence to principles of academic freedom. And, it allows a religious college to present itself to prospective students and faculty members as an accredited academic institution, albeit one with certain clearly defined religious attributes.

Duquesne University has openly embraced the 1940 Statement of Principles on Academic Freedom. Doing so commits the University to imposing on faculty members and students only those religious obligations that have been clearly stated in advance. The University has imposed such clear religious obligations on the Theology faculty. But it has not imposed them on the other part-time adjunct faculty members at issue in this case. The Board, therefore, acted within its authority in asserting jurisdiction over these faculty members.

## ARGUMENT

In *Pacific Lutheran University*, the Board “reexamine[d] the standard [it will] apply for determining, in accordance with the Supreme Court’s decision in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), when [it] should decline to exercise jurisdiction over faculty members at self-identified religious colleges and universities.” 361 NLRB at 1404. Henceforth, the Board will “decline to exercise jurisdiction over faculty members at a college or university that claims to be a religious institution” if “the college or university . . . holds out the petitioned-for faculty members as performing a religious function.” *Ibid.*

The Board characterized its new test as “extend[ing] the ‘holding out’ principle,” articulated by this Court in *Great Falls*, “to [its] analysis of faculty members’ roles.” 361 NLRB at 1411. In this regard, the Board explained that it will “decline jurisdiction if the university ‘holds out’ its faculty members, in communications to current or potential students and faculty members, and the community at large, as

performing a specific role in creating or maintaining the university's religious purpose or mission.” *Ibid.* Applied in this way, “the ‘holding out’ requirement eliminates the need for a university to explain its beliefs, avoids asking how effective the university is at inculcating its beliefs, and does not ‘coerce[] an educational institution into altering its religious mission to meet regulatory demands.” *Ibid.*, quoting *Great Falls*, 278 F.3d at 1344-45.

By directing “the focus of [its] inquiry . . . under *Catholic Bishop* . . . on the faculty members themselves, rather than on the nature of the university as a whole,” *Pacific Lutheran University* returns to the original understanding that “[t]he religious function of teachers” is the “central focus of the jurisdictional test” stated in *Catholic Bishop*. 361 NLRB at 1410 & n. 10. Returning to *Catholic Bishop*’s focus on the religious function of teachers has allowed the Board to “discard the ‘substantial religious character’ test” that entailed “an[] intrusive inquiry into a university’s religious beliefs or actual practices.” *Id.* at 1408.

As we will develop after first considering the *Catholic Bishop* decision itself, religious colleges have fought hard to be allowed to assert that the general education they provide in fields that are not subject to religious controls is equal to that provided by secular colleges. *See* McConnell, “Academic Freedom in Religious Colleges and Universities,” 53 *Law & Contemp. Probs.* 303, 307-08 (1990). By “extend[ing] the ‘holding out’ principle to [the Board’s] analysis of faculty members’ roles,” *Pacific Lutheran University* allows religious colleges to “assert[] a commitment to diversity and academic freedom” with respect to faculty members who do not “have any religious requirements imposed on them,” even if other faculty members are subject to such requirements. 361 NLRB at 1411. Thus, religious colleges are allowed to “put[] forth the message that religion has no bearing on faculty members’ job duties or responsibilities” in secular areas of study, as these faculty members function just like “faculty members at nonreligious universities.” *Ibid.*

1. *Catholic Bishop* Focused on the Religious Role Necessarily Performed by Parochial School Teachers.

The crux of the Supreme Court's opinion in *Catholic Bishop* has been accurately and succinctly described by the Second Circuit:

"The entire focus of *Catholic Bishop* was upon the obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith. \* \* \* At no place in the Court's discussion of the entanglement problem in *Catholic Bishop* is diocesan ownership and management suggested as the basis for religious entanglement. It is the commitment of the faculty to religious values no matter what subject in the curriculum is taught and the obligation to propagate those values which provides the risk of entanglement." *NLRB v. Bishop Ford Central Catholic High School*, 623 F.2d 818, 822 (2d Cir. 1980).

The *Catholic Bishop* opinion focused on "[w]hether *teachers* in schools operated by a church to teach both religious and secular subjects are within the jurisdiction granted by the National Labor Relations Act." 440 U.S. at 491 (emphasis added). In order to avoid

“the consequent serious First Amendment questions that would follow” from “the Board’s exercise of jurisdiction *over teachers* in church-operated schools,” the Court “decline[d] to construe the Act in a manner” that would “bring *teachers* in church-operated schools within the jurisdiction of the Board.” *Id.* at 503 & 507 (emphasis added).

The repeated use of the phrase “jurisdiction over teachers” throughout the *Catholic Bishop* opinion reflected a conscious re-framing of the issue from that used by the NLRB.<sup>1</sup> The Board had treated the question as one aspect of its “assertion of jurisdiction over private schools” and “declined to exercise jurisdiction” over “church-operated schools . . . only on the grounds of the employer’s minimal impact on commerce.” *Id.* at 497. On that view of the issue, the Board would “decline jurisdiction over [religious] institutions only when they are

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<sup>1</sup> See 440 U.S. at 491 (“jurisdiction over lay faculty”), 499 (“jurisdiction over teachers in religious schools”), 499 (“jurisdiction over these teachers”), 500 (“jurisdiction over teachers in church-operated schools”), 504 (“jurisdiction over teachers in church-operated schools”), 505-06 (“jurisdiction over teachers in a church-operated school”), 507 (“jurisdiction over teachers in church-operated schools”) & 507 (“bring teachers in church-operated schools within the jurisdiction of the Board”).

completely religious, not just religiously associated.” *Id.* at 498.

Rejecting the Board’s approach, the Supreme Court focused on “the consequent serious First Amendment questions that would follow” from “the Board’s exercise of jurisdiction over teachers in church-operated schools.” 440 U.S. at 504. In particular, the Court focused on how “[t]he church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school.” *Ibid.*

*Catholic Bishop* involved teachers in “parochial schools,” and the Court considered it highly pertinent that “[r]eligious authority necessarily pervades the school system.” 440 U.S. at 501, quoting *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971). With the “teacher[s] under religious control and discipline,” the Court found that “the separation of the religious from the purely secular aspects of pre-college education” would be impossible. *Ibid.*, quoting *Lemon*, 403 U.S. at 617. Given “the importance of the teacher’s function in a church school,” regardless of the subject being taught, “the danger that religious

doctrine will become intertwined with secular instruction persists.”

*Ibid.*, quoting *Meek v. Pittenger*, 421 U.S. 349, 370 (1975).

“[R]ecogniz[ing] the critical and unique role of the teacher in fulfilling the mission of a church-operated school,” the Court concluded that there was “no escape from conflicts flowing from the Board’s exercise of jurisdiction over teachers in church-operated schools and the consequent serious First Amendment questions that would follow.” 440 U.S. at 501 & 504. “Accordingly, in the absence of a clear expression of Congress’ intent to bring teachers in church-operated schools within the jurisdiction of the Board, [*Catholic Bishop*] decline[d] to construe the Act in a manner that could in turn call upon the Court to resolve difficult and sensitive questions arising out of the guarantees of the First Amendment Religion Clauses.” *Id.* at 507.

2. Accepted Principles of Academic Freedom Make it Possible for Religious Colleges to Separate their Secular Educational Functions from their Religious Educational Functions.

In *Tilton v. Richardson*, 403 U.S. 672, 680 (1971), a companion case to *Lemon*, the Court rejected “the proposition that religion so

permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable.” Chief Justice Burger – the author of the Court’s opinions in both *Lemon* and *Catholic Bishop* – explained that there are “significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools.” *Id.* at 685. In particular, Chief Justice Burger noted that, “by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines” and that “[m]any church-related colleges and universities are characterized by a high degree of academic freedom.” *Id.* 686.

To demonstrate that the colleges at issue in *Tilton* “were characterized by an atmosphere of academic freedom rather than religious indoctrination,” Chief Justice Burger relied on the fact that the colleges “subscribe to the 1940 Statement of Principles on Academic Freedom and Tenure endorsed by the American Association of

University Professors and the Association of American Colleges.” 403 U.S. at 681-82. Adherence by a religious college to the 1940 AAUP/AAC Statement of Principles eliminates the “danger that religious doctrine will become intertwined with secular instruction.” *Catholic Bishop*, 440 U.S. at 501 (quotation marks and citation omitted).

The 1940 AAUP/AAC Statement provides that “[t]eachers are entitled to freedom in the classroom.” JA 993, Academic Freedom ¶ 2. Significantly, the 1940 Statement includes an exception from this categorical principle that allows “[l]imitations of academic freedom because of religious or other aims of the institution [that are] clearly stated in writing at the time of the appointment.” *Ibid.* As a result of the “limitations clause,” “[i]nstitutions that limited freedom for religious or other purposes could be exempted from the general rules so long as they stated in writing their restrictions as conditions for appointments.” Marsden, “The Ambiguities of Academic Freedom,” 62 *Church History* 221, 230 (1993).

The “limitations clause” was included in the 1940 Statement at

the insistence of the Association of American Colleges (AAC), a co-sponsor of the Statement that included many religious colleges among its membership.<sup>2</sup> Metzger, “The 1940 Statement of Principles on Academic Freedom and Tenure,” 53 Law & Contemp. Probs. 3, 22-24 & 32-36 (1990). The AAC “held that religious colleges could require faculty members to adhere to creeds but . . . insist[ed] that such requirements be made known to candidates for positions before they sign on.” *Id.* at 24. The AAC maintained that, “provided it makes its doctrinal demands crystal clear in the original terms of employment, an academic institution may impose such demands” without “violating the rules of academic freedom.” *Id.* at 33. In other words, religious colleges “may claim to have academic freedom when they limit it only in these sanctioned ways.” *Ibid.*

“In practice, the limitations clause was taken to mean that religious colleges and universities were free to adopt their own principles of academic freedom without interference or censure by the

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<sup>2</sup> The Association of American Colleges is now known as the Association of American Colleges and Universities.

academic community, so long as those principles were clearly announced in advance.” McConnell, 53 Law & Contemp. Probs. at 307-08. This allowed “secular and religious universities [to] coexist, each operating within its own understanding of the principles needed for the advancement of knowledge.” *Id.* at 308.

Professor McConnell described the options granted to religious colleges by the “limitations clause”:

“Many religiously affiliated schools freely adopted the academic freedom norms of the secular universities. A very small number maintained the older dogmatic approach within the entire institution, requiring faculty and sometimes students to abide by religious codes of conduct and faith. A larger number adopted various compromises with the secular position, embracing academic freedom in its essentials but taking certain steps to preserve the religious identity of the school. Many of these institutions confined religious constraints to those disciplines, such as theology, where religious norms were most directly

relevant. The organized academic community did not attempt to interfere with these choices under the 1940 Statement, so long as they were clearly stated in writing.” *Ibid.*

In sum, what religious colleges sought by the inclusion of the “limitations clause” in the 1940 AAUP/AAC Statement was the option to “require faculty members to adhere to creeds” provided “that such requirements be made known to candidates for positions before they sign on.” Metzger, 53 Law & Contemp. Probs. at 24. A religious college may “impose such demands” without “violating the rules of academic freedom” in the 1940 Statement only if “it makes its doctrinal demands crystal clear in the original terms of employment.” *Id.* at 33.

### 3. Duquesne University Publicly Proclaims its Commitment to Academic Freedom in Carrying Out its Secular Educational Functions.

In order to achieve accreditation by The Middle States Commission on Higher Education, Duquesne University represented that, “[i]n keeping with University standards across the country, Duquesne recognizes the principles of academic freedom and due

process as set forth by the Association of American University Professors (AAUP).” JA 862. Duquesne’s President testified that the principles of academic freedom referred to here are those contained in the 1940 AAUP/AAC Statement. JA 232-34. *See* JA 993.

The most important way that a college “describes itself to the consuming public,” *Carroll College, Inc. v. NLRB*, 558 F.3d 568, 573 (D.C. Cir. 2009), is through accreditation by a recognized accrediting agency. Such an agency “applies and enforces standards . . . that ensure that the courses or programs of instruction . . . are of sufficient quality to achieve . . . the stated objective for which the courses or the programs are offered.” 20 U.S.C. § 1099b(a)(4)(A). As Duquesne’s President testified, the Middle States Commission “is the major accrediting body for our region of the country, and so we would be an unaccredited institution without it.” JA 232.

The Middle States Commission clearly states that “[a]n accredited institution is expected to possess or demonstrate . . . a climate of academic inquiry and engagement supported by widely disseminated

policies regarding academic and intellectual freedom” and “honesty and truthfulness in public relations announcements, advertisements, and recruiting and admissions materials and practices.” JA 1035-36. In particular, the Commission requires:

“Institutions whose charters and policies require adherence to specific beliefs or codes of conduct for faculty, staff, or students should provide prior notice of these requirements. The institution should state clearly the conditions of employment or study.” JA 1035.

In order to convince the Middle States Commission that it meets these criteria, Duquesne made the following representations:

“In its Mission Statement, Duquesne defines itself as ‘a community dedicated to the discovery, enhancement, and communication of knowledge and to the free and diligent pursuit of truth, in order to provide society with men and women able and willing to act as wise, creative, and responsible leaders’ (appendix MS, p. 1). In practical terms this means that Duquesne is open to

the exploration and discussion of new and controversial ideas, and that the University places a premium on intellectual autonomy and integrity and the pursuit of truth through scholarly research.

“The *Faculty Handbook* is explicit in its statement that ‘freedom in research is fundamental to the advancement of truth,’ and that ‘academic freedom is essential to teaching’ (appendix FHB, p. 12); that, faculty are free to pursue all ideas in their research, to publish the results thereof, and to put forward all ideas relevant to their subject area for critical examination in the classroom setting.

“In keeping with University standards across the country, Duquesne recognizes the principles of academic freedom and due process as set forth by the Association of American University Professors (AAUP). The policies and procedures for promotion and tenure for faculty are explained clearly in the *Faculty Handbook*, including a detailed accounting of the expectations and requirements of faculty members, a full explanation of the means

by which promotion and tenure decisions are made within the University, and guidelines for filing a grievance complaint after decisions have been handed down. (appendix FHB, pp. 19-21, 25-48, 53-56).” JA 861-62.

When asked to identify where in the Faculty Handbook the University had stated any “[l]imitations of academic freedom because of religious . . . aims of the institution,” Duquesne’s Provost pointed to a sentence stating that “[t]he teacher should respect the religious and ecumenical orientation of the university.” JA 268-69. *See* Pet. Br. 16 & 37. That sentence appears in the following paragraph, which we quote in full to provide context:

“Academic freedom is essential to teaching. The teacher is entitled to freedom in the classroom. The teacher should not, however, interject opinions which have no relation to the subject and should not impose personal views of the subject upon the students. *The teacher should respect the religious and ecumenical orientation of the University.*” JA 770 (emphasis added).

The “religious and ecumenical orientation of the University,” as described in its Mission Statement, is that “Duquesne serves God by serving students – through commitment to excellence in liberal and professional education.” JA 697. In its statement to the Middle States Commission on Higher Education, the University explained that, “[i]n practical terms [the Mission Statement] means that Duquesne is open to the exploration and discussion of new and controversial ideas, and that the University places a premium on intellectual autonomy and integrity and the pursuit of truth through scholarly research.” JA 861.

In short, the faculty members show “respect for the religious and ecumenical orientation of the University” by responsibly teaching the subjects they were hired to teach. That is why, as the University put it in its brief to the NLRB, “even a class on planets taught by an atheist professor at Duquesne contributes to the Catholic, Spiritan mission.” JA 101. Indeed, when asked to describe what sort of “[dis]respect for the religious and ecumenical orientation of the University” might get a faculty member into trouble, the University President agreed that

openly “mock[ing] the notion of serving God by serving students” might be “a serious matter,” but only if the mocking was not in the service of “a teachable moment” and only “if it was meant, seriously, to try to undermine what we stand for.” JA 227-28. This is nothing more than a typical employment rule against product disparagement. *See Endicott Interconnect Technologies, Inc. v. NLRB*, 453 F.3d 532, 537 (D.C. Cir. 2006).

There is one segment of the faculty that is subject to clearly delineated limitations on academic freedom. Teachers in the Department of Theology “are all made aware of their obligation to teach authentic Catholic teaching.” JA 201. Indeed, “professors who teach Catholic theology [must] have a formal letter of recognition from the bishop, saying that they are teaching recognized Catholic theology.” JA 210. It is precisely because of this limitation that the Board excluded part-time adjunct theology teachers from the bargaining unit.

In sum, in order to achieve accreditation by the Middle States Commission, Duquesne University has represented that it adheres to

“widely disseminated policies regarding academic and intellectual freedom” and, aside from the Department of Theology, the University has not “state[d] clearly [any] conditions of employment” that “require adherence to specific beliefs or codes conduct for faculty.” JA 1035-36. Thus, Duquesne “asserts a commitment to diversity and academic freedom, further putting forth the message that religion has no bearing on faculty members’ job duties or responsibilities.” *Pacific Lutheran University*, 361 NLRB at 1411. There is every reason to take Duquesne at its word on this, and thus “there is no basis on which to distinguish [its faculty outside of the Theology Department] from faculty members at nonreligious universities or to exclude them from coverage under the Act.” *Ibid*.

4. This Court’s Decision in *Great Falls* Does Not Require the Board to Ignore a Religious College’s Public Representations Regarding the Educational Role of its Teachers.

The University’s principal argument is that the Board was precluded from considering Duquesne’s public characterization of the role of its faculty by this Court’s *Great Falls* decision. Pet. Br. 25-34.

To the contrary, *Pacific Lutheran University* faithfully follows this Court's direction in *Great Falls* by requiring that any determination of the role played by faculty at a religious college be based solely on the college's own public description of the faculty's role.

*Great Falls* concerned the Board's "substantial religious character" test, which focused on whether "the *school's* purpose and function was the propagation of a religious faith." *University of Great Falls*, 331 NLRB 1663, 1665 (2000) (emphasis added). That test "ha[d] the NLRB trolling through the beliefs of the University, making determinations about its religious mission, and that mission's centrality to the 'primary purpose' of the University." *Great Falls*, 278 F.3d at 1342. "This is the *exact* kind of questioning into religious matters which *Catholic Bishop* specifically sought to avoid." *Id.* at 1343 (emphasis in original). Instead of "questioning [a college] about its motives or beliefs," this Court held that the Board should consider "whether an institution holds itself out to the public as religious." *Id.* at 1344.

*Great Falls*, however, did not hold that the Board must decide jurisdiction based solely on the religious nature of the college and without regard for the role played by the faculty. The question did not arise, because the Board’s “substantial religious character” test at issue there focused on “the beliefs of the University” and “its religious mission.” *Great Falls*, 278 F.3d at 1342. *Catholic Bishop* itself rejected the Board’s focus on the religious nature of a school and instead determined whether the NLRB could assert jurisdiction based on the role played by the teachers. *Great Falls* does not preclude the Board from applying *Catholic Bishop*’s teacher-centered approach to determining jurisdiction over religious colleges.

Nor did *Great Falls* hold that, no matter how religious colleges structure their educational functions, it is invariably the case that “religion so permeates the secular education provided by church-related colleges and universities that their religious and secular educational functions are in fact inseparable.” *Tilton*, 403 U.S. at 680. That would be contrary to the Supreme Court’s decision in *Tilton*. It would also be

profoundly disrespectful to the “[m]any religiously affiliated schools [that have] freely adopted the academic freedom norms of the secular universities” by “embracing academic freedom in its essentials [while] taking certain steps to preserve the religious identity of the school,” mainly in “those disciplines, such as theology, where religious norms were most directly relevant.” McConnell, 53 Law & Contemp. Probs. at 308.

That leaves *Great Falls*’ concern over the NLRB “troll[ing] through the beliefs of schools, making determinations about their religious mission, and that mission’s centrality to the ‘primary purpose’ of the school.” *Carroll College*, 558 F.3d at 572 (brackets, quotation marks and citation omitted). *Pacific Lutheran University* directly addresses that concern – consistent with both *Great Falls* and *Catholic Bishop* – by “extend[ing] the ‘holding out’ principle to [the Board’s] analysis of faculty members’ roles.” 361 NLRB at 1411.

The requirement that religious restrictions on academic freedom be “clearly announced in advance” performs a “‘truth in advertising’

function,” McConnell, 53 Law & Contemp. Probs. at 308 & 317, that is directly related to “how [the college] describes itself to the consuming public,” *Carroll College*, 558 F.3d at 573. As Professor McConnell has remarked, in arguing against the suggestion by an AAUP subcommittee that invocation of the “limitations clause” in the 1940 Statement is inconsistent with a claim to academic freedom, “[r]eligious colleges and universities should not be shy to admit that their understanding of academic freedom [may] differ from that of the AAUP.” 53 Law & Contemp. Probs. at 317.<sup>3</sup> Indeed, it was the thrust of Professor McConnell’s argument that “a clear declaration to that effect should serve to prevent misunderstanding,” *ibid.*, and allow “secular and religious universities [to] coexist, each operating within its own understanding of the principles needed for the advancement of

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<sup>3</sup> A later, more authoritative statement by the AAUP recognized that a college could assert that it is “subject to the academic freedom provisions of the 1940 Statement,” while invoking “the limitations clause.” “Academic Freedom at Religiously Affiliated Institutions: The ‘Limitations’ Clause in the 1940 Statement of Principles on Academic Freedom and Tenure,” *AAUP Policy Documents and Reports* 64-67 (2015). See JA 771 (referring faculty to this and other AAUP statements).

knowledge,” *id.* at 308.

Like “[m]any religiously affiliated schools,” Duquesne University has “freely adopted the academic freedom norms of the secular universities.” McConnell, 53 Law & Contemp. Probs. at 308. And, like “[m]any of these institutions,” Duquesne has “confined religious constraints to those disciplines, such as theology, where religious norms [a]re most directly relevant.” *Ibid.* To be consistent with “the 1940 Statement” that Duquesne has pledged to follow, such “religious constraints” must be “clearly stated in writing.” *Ibid.*

Duquesne has clearly stated the religious constraints applicable to its Theology faculty. “[T]hey are all made aware of their obligation to teach authentic Catholic teaching.” JA 201. “[T]he professors who teach Catholic theology [must] have a formal letter of recognition from the bishop, saying that they are teaching recognized Catholic theology.” JA 210. The Board excluded adjunct professors of Theology from the unit in this case. JA 138.

As to the other adjunct faculty members, Duquesne has publicly

stated that they “are free . . . to put forward all ideas relevant to their subject area for critical examination in the classroom setting.” JA 862. Recognizing that “academic freedom is essential to teaching,” Duquesne has defined itself as “open to the exploration and discussion of new and controversial ideas.” JA 861-62. In its public statements, Duquesne has not so much as hinted at any religious constraints on teaching outside the Department of Theology.

5. NLRB Jurisdiction Over the Bargaining Unit of Part-Time Adjunct Professors Will Not Result in Entanglement with the Religious Functions of Duquesne University.

As an after-thought, Duquesne argues that application of the NLRA to its part-time adjunct faculty will interfere with the University’s free exercise of religion. Pet. Br. 41-46. The speculative and totally abstract nature of this argument merely confirms that allowing the adjunct professors to bargaining collectively presents very little danger of NLRB entanglement with the University’s religious functions.

“Duquesne collectively bargains with unions representing non-

faculty staff.” Pet. Br. 2. Yet, the University has not been able to point to a single instance in which that bargaining has interfered with the University’s exercise of religion.

The University speculates that recognizing the union representative of part-time adjunct professors might require bargaining over “Duquesne’s religious mission and its decisions on how its faculty should carry out that mission.” Pet. Br. 43. But “Duquesne’s religious mission” and “how its faculty should carry out that mission” are matters of management prerogative that are not negotiable under the National Labor Relations Act. *See Newspaper Guild of Greater Philadelphia v. NLRB*, 636 F.2d 550, 559-61 (D.C. Cir. 1980) (newspaper does not have to bargain over reporting standards).<sup>4</sup>

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<sup>4</sup> In this Court, Duquesne’s claim under the Religious Freedom Restoration Act is based solely on the assertion that “the collective bargaining process will pressure Duquesne to concede matters vital to its religious mission or risk facing Board sanctions based on unfair labor practice charges or even a strike.” Pet. Br. 53. That is a different RFRA claim than the one Duquesne tersely advanced before the NLRB in challenging the certification in this case. *See* JA 112-13 n. 10 (*PLU* test violates RFRA by “discouraging faculty who may want to be represented by a Board-approved bargaining unit from taking an active role in creating and maintaining Duquesne’s religious educational

The University also speculates that “[a]ny time [it] takes disciplinary action against a represented employee for conduct contrary to the university’s religious mission, its risks an unfair labor practice charge in which the union alleges that it acted based on anti-union animus.” Pet. Br. 43. “Anti-union animus” is not the only legally proscribed motive for employment discrimination. The University could just as easily face a Title VII lawsuit alleging unlawful discrimination based on racial animus. Demonstrating that a discharge was not motivated by anti-union animus would be no more difficult than demonstrating that it was not motivated by racial animus. Religious

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mission.”). Since Duquesne’s current version of its RFRA claim was not advanced before the Board in the underlying representation case, the University cannot now challenge the Board’s decision on this ground. 29 U.S.C. § 160(e). *See* NLRB Br. 51-57.

In any event, the University’s current version of its RFRA claim is completely without merit. As we demonstrate in text, the University will not be required to bargain over management prerogatives, such as its religious mission and how best to fulfill that mission. As to the risk of the Union calling a strike, that could happen regardless of whether the NLRB asserts jurisdiction. Thus, the University has failed to so much as suggest any interference with its exercise of religion that might result from the Board taking jurisdiction over the unit of part-time adjunct professors.

employers have carte blanche in discharging employees who perform the role of minister. *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 188 (2012). But “the First Amendment [h]as not [been] found to bar the adjudication of employment discrimination claims” where “the functions performed by the plaintiffs were not ministerial.” *EEOC v. Catholic University of America*, 83 F.3d 455, 464 (D.C. Cir. 1996).

Finally, the University notes the possibility of a student raising religious issues in class. Pet. Br. 45-46. The example given is that “a faculty member teaching a course on evolution at a Christian university might be asked by a student how evolution is consistent with the Biblical account of creation.” *Id.* at 45. And, the supposed problem of NLRB entanglement would arise from “any adverse employment action . . . based on the faculty member’s response.” *Id.* at 45-46. But punishing a biology teacher for answering a question about evolution – even if the answer implicates religious issues – is precisely the sort of thing that Duquesne has publicly committed *not* to do. That is what it

means for a college to be “characterized by an atmosphere of academic freedom rather than religious indoctrination.” *Tilton*, 403 U.S. at 681.

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By seeking and receiving the accreditation of the Middle States Commission on Higher Education, Duquesne University “describes itself to the consuming public,” *Carroll College*, 558 F.3d at 573, as a college that maintains “a climate of academic inquiry and engagement supported by widely disseminated policies regarding academic and intellectual freedom,” JA 1036. In doing so, the University pledged that, “[i]n keeping with University standards across the country, Duquesne recognizes the principles of academic freedom and due process as set forth by the Association of American University Professors (AAUP),” JA 862, set forth in the 1940 AAUP/AAC Statement, JA 232-34 & 993. Consistent with those principles, “[i]nstitutions whose charters and policies require adherence to specific beliefs or codes of conduct for faculty . . . should provide prior notice of these requirements” and “should state clearly the conditions of

employment.” JA 1035.

Under the 1940 Statement, any “obligation of lay faculty to imbue and indoctrinate the student body with the tenets of a religious faith,” *Bishop Ford Central Catholic High School*, 623 F.2d at 822, must be “crystal clear in the original terms of employment,” Metzger, 53 Law & Contemp. Probs. at 33. The “‘truth in advertising’ function,” McConnell, 53 Law & Contemp. Probs. at 317, performed by this requirement addresses “the danger that religious doctrine will become intertwined with secular instruction,” *Catholic Bishop*, 440 U.S. at 501, quoting *Meek*, 421 U.S. at 370. *See Tilton*, 403 U.S. at 681-82. “It is the commitment of the faculty to religious values no matter what subject in the curriculum is taught and the obligation to propagate those values which provides the risk of entanglement.” *Bishop Ford Central Catholic High School*, 623 F.2d at 822. Precisely because Duquesne does not hold out the part-time adjunct professors at issue here as having any duty to propagate religious values in the course of their teaching, the Board’s certification of their selection of a collective bargaining agent

raises no risk of NLRB entanglement with the University's religious functions.

### CONCLUSION

The decision and order of the National Labor Relations Board should be enforced.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME  
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1. This brief complies with the type-volume limitations of Circuit Rule 32(e)(2)(B) because this brief contains 6,547 words, excluding the parts of the brief exempted by Fed. R. App. P.32(f).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in a 14-point type in a Century font style.

/s/ James B. Coppess

James B. Coppess

Date: October 26, 2018

### CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2018, the foregoing Final Brief for Intervenor United Steel, Paper and Forestry, Rubber, Manufacturing, Allied-Industrial and Service Workers International Union, AFL-CIO-CLC, was served on all parties or their counsel of record through the CM/ECF system.

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